COURT NO.3

Criminal Miscellaneous Application no. 250 of 2002

Deshraj and others ……Petitioners

Vs.

State of Uttaranchal and others ….. Respondents.

Hon'ble Irshad Hussain, J.

Heard Sri Rajendra Singh, learned counsel for the petitioners and Sri D.K.Sharma, learned Addl.G.A. appearing on behalf of the respondents.

A stay application was filed in this petition, which was preferred under section 482/483 of Code of Criminal Procedure for quashing of the order of cognizance passed by the Magistrate and the order of the Sessions Judge rejecting the revision filed by the accused against the order of taking cognizance. Since the matter has come up for hearing and the arguments in the main petition were heard earlier, the petition is being disposed of finally.

It is not in dispute that respondent no.4 filed an F.I.R. (Annexure-3), which was registered as case crime no. 145A of 2001, under sections 323,504,452,324,506/147 of I.P.C. at P.S. Laksar District Haridwar. After investigation final report was submitted whereupon the complainant preferred a protest petition before the Magistrate concerned. The learned Magistrate by order dated 12.02.2002 (Annexure 11) also considered the affidavits of two witnesses, viz., Suresh and Sher Singh who were not examined during the investigation by the I.O. besides the material in the case dairy, and on his appreciation of the said material and the affidavits of these two witnesses, found the prima facie case being made out against the accused, passed the order taking the cognizance against the accused-petitioners. The accused-petitioners feeling aggrieved by this order, preferred a revision before the learned Sessions Judge who by judgment and order dated 03.07.2002 (Annexure 12) dismissed the

same thereby rejecting the contention that the learned Magistrate was not legally obliged to straightway take cognizance of the case when the affidavits of witnesses not examined during the investigation were taken into account to form an opinion about the prima facie case against the accused-petitioners.

Learned counsel in support of the similar arguments placed reliance on a decision of Division Bench of the Allahabad High Court in the matter of **Pakhando and others Vs. State of U.P. and another reported in 2001(43) ACC, 1096.** In the said case stress was laid on the inference that where the Magistrate receives final report, four options are open to him and he may adopt any one of them on the facts and circumstances of a particular case. One of the modes to be adopted is that the Magistrate straightway took cognizance on perusal of the material available in the case dairy. This mode was not adopted by the learned Magistrate in this case. Instead the learned Magistrate took into account the affidavits of the two witnesses named above and took cognizance against the accused-petitioners by observing that prima facie case against them was made out. The material on record shows that such an option was not available for the Magistrate. When the fresh material in the form of the affidavits of the two witnesses were brought on record the learned Magistrate was legally obliged to follow the procedure as in applicable in a complaint case and to proceed to record the evidence under section 200 and 202 of the Code as the case may be and then to form an opinion about sufficient reasons to summon the accused and take cognizance against them. Since this has not been done, the impugned order passed by the learned Magistrate was not legally maintainable and the learned Sessions Judge should have also taken into account this aspect of the matter, but the same was not done.

Having considered the facts and circumstances, both the impugned judgment and orders of the learned Sessions Judge as well as the Magistrate (Annexures nos. 11 and 12) are set aside. The learned Magistrate concerned is directed to reconsider the matter in the light of the observations made above and to take proper decision

either on the basis of the material available in the case dairy or to adopt a procedure as is applicable to a complaint case and then to pass appropriate order in the case.

With the above observations, the petition is finally disposed of.

(Irshad Hussain, J.)

02.11.2002./B.